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THE WHITE HOUSE

Sarah –

Attached are copies of the notes I have for speeches, seminars, etc. I'd appreciate your reviewing them.

Ellen

THE FIRST AMENDMENT AND NEW TECHNOLOGY
Speech to NAA, NAB, LDRC

Academic hat: Before I do anything else, I should make a comment about what hat I'm wearing today. As Dan has said, I'm currently serving as an Associate Counsel to the President. But in what I continue to regard as my real life, I'm a law professor. And it's in that capacity I'm speaking you today. Dan asked me to do this when I was a law professor; I agreed when I was a law professor; and everything I'm going to say is said as a law professor, not -- not, not, not -- as a White House aide.

Speech as described: Now when Dan asked me to give this talk, he described it as the time when an academic stood up and talked about the Supreme Court's most recent rulings on libel law. And in the absence of any recent rulings on libel law, it was the time an academic stood up and commented on the direction in which the Supreme Court was going in First Amendment cases generally.

No libel: But as I was thinking yesterday about what I was going to say here, I thought neither of those would be a very interesting talk. The Supreme Court issued no defamation cases this year. The important things that happened in the field of defamation seemed this year to happen more in the settlement room than in the courtroom. And doubtless, all of you could tell me more about those things -- or that one big thing -- than I could tell you.

Not much else: And with respect to First Amendment law generally: frankly, the Court did nothing terribly exciting this year. It decided a lot of cases. But none of those should have been surprising. In Rosenberger, it reemphasized what has become the keystone of First Amendment doctrine: the strict presumption against content-based -- and even more, against viewpoint-based -- discrimination. In other cases, the Court reminded us of the different standards of review applied to high-value and low-value speech: although the restrictions in both cases were struck down, compare the Court's analysis in McIntyre, involving anonymous political speech, with the analysis in Coors, involving commercial labeling and advertisements. In general, what we saw in the Court's First Amendment cases this year is a real stability in the doctrine -- broad agreement on basic principles and even on many of their applications.

But technology changes: Now where does that leave me in terms of something to talk about? Well, if the doctrine of free speech hasn't changed much recently, the technology of speech is changing all the time -- indeed, it seems, at an

ever-accelerating pace. And the next great challenge for free speech law is for it to figure out how to deal with these changes in technology. I note that many of the panels in this conference involve that question. And I thought I would spend my time discussing it too.

New ways to restrict speech: It seems to me that there are two ways technology can affect the law of free speech. First, technology can provide new ways to restrict speech. Think of the V-chip. Perhaps our new ability to manufacture such an instrument will minimize the desire for, obviate the need for, more direct restrictions on speech. But perhaps too this new ability -- and others like it -- will open up new opportunities, new ways, new methods of, if not censoring, at least influencing the sphere of public discourse. As these new methods arrive on the scene, one of the most important challenges for the Court is to be able to see them for what they are. Simply put, the Court may have to learn to recognize technologically advanced forms of speech regulation.

New speech; small and big questions: Second, technology can provide new ways to speak, which themselves seem to call for some change in First Amendment doctrine. Now there are a set of small questions here, and then there's a bigger broader question. I'll deal with each in turn.

Small questions: The small questions are ones of application: how do we apply the basic principles of free speech law to new technologies and new situations. All of you, lawyers and journalists, are probably aware of more of these questions than I am. But here are just a few examples. First, do we hold liable the owners and/or operators of bulletins board and electronic mail services for what is said in those places? (The answer to this question itself may rest largely on the state of technology; it depends -- or should -- on whether the carrier of speech has available to it cheap and effective ~~messages~~ methods of detecting and stopping unlawful messages.) Second, how do we use the community standards prong of the obscenity test in cyberspace? Which community do we look at? Surely not where the community is downloaded? If not that, then what?

Small potatoes: But all this is relatively small potatoes: the kinds of questions courts and lawyers must answer every day. Always, courts must figure out how to adjust basic principles and rules to new contexts, whether created by new technology or otherwise. Such questions may be tricky; they may be important; but they are in essence common.

Big question -- change in basic principles? The broader question is whether these emerging technologies call for a whole new set of normative structures and frameworks; whether they demand not the application of old principles

but the embracing of new principles. At the beginning of this talk I talked about how stable First Amendment doctrine was. In some sense, the question here is whether this stability ~~is a good sense~~, given revolutionary changes in technology. Do such changes require revolutionary changes in law? makes sense

Three answers: There are three possible answers to this question: yes, no, and wait and see. In the remainder of my talk, I want to discuss these three answers very generally, without coming down firmly in any one camp or the other.

Basic change required: The affirmative answer holds that existing speech law assumes certain methods of communication; that emerging are wholly new methods; that if the law we have is applied to these new methods, the balance we have struck between speech and competing interests -- the accommodation we have reached -- is fundamentally changed and subverted. For example, we have deemed a particular kind of balance appropriate with respect to the interests of speech and reputation. But what happens now that a libelous statement, by a single irresponsible individual, can with no cost at all and by a touch of the button reach literally millions of people. If we apply old rules of defamation law, notwithstanding the technological realities, have we not truly altered the preexisting balance between expression and other values?

Not. (1) Courts don't do well. The negative answer -- which is perhaps the answer suggested in the Court's opinion in Turner from two terms ago -- responds in several ways. First, we might note that in the free speech area and in others, courts have not proved proficient in perfectly (or even imperfectly) understanding new technologies and their implications. For example, did the scarcity rationale ever make sense with respect to broadcasting? Perhaps courts should only with great forethought and caution determine that new technology demands a new legal framework.

(2) No real revolution: Second, perhaps this supposed technological revolution is not so revolutionary after all. Let us grant that some speech now becomes cheaper, faster, more potent and effective. So what? It has always been true that some speech becomes -- then for a time is -- cheaper, faster, more potent than other speech. The technological changes we are seeing now are no different from many others that have occurred in communications history. ~~So too we have always had disparities in the ease and effectiveness of different kinds of communication. This~~ is nothing new under the sun; it certainly does not require fundamental changes in First Amendment doctrine.

— or at least other comparable revs.

Make too much of what is new — how it differs from what came before, will come of it.

The Internet

(3) Revolution makes current law better. Third, maybe we can reverse the argument: the technological changes we are

seeing today do not demand a change in First Amendment law; rather, they provide a surer basis than ever for current First Amendment doctrine. How could this be? Because the doctrine today is in many respects based on a set of fictions: that speech opportunities are available to everyone; that speech can be met with counterspeech; that because of some rough equality in access, the marketplace of ideas largely works. It's important to note that these are fictions, though perhaps necessary ones. The point I want to make is that technological changes may make these assumptions less fictional and more real than ever before. By making speech cheaper and more accessible, technological changes may improve the working of the marketplace of ideas. And if that's true, new technology will have helped the real world of speech catch up with First Amendment doctrine.

Wait and see. But perhaps we can't yet know which of these alternative positions -- as to whether we must fundamentally change First Amendment doctrine -- is correct. Perhaps we can't yet know because we don't know what this technological revolution is yet, or where it will take us. Hence we might adopt a sort of "hedge your bets" solution: let the pot simmer, see where these technological developments lead, refuse to commit, for as long as possible, to one approach or the other. This may seem the fearful course, but it may be wise one, given the speed with which communicative technology is changing, and the uncertainty that the world of expression tomorrow will remotely resemble the one ~~we~~ with ~~have today~~. which we are familiar.

Remarks on Turner

Brief overview of two questions: I've been asked to talk about Turner as it relates to the most fundamental distinction in current First Amendment doctrine: the distinction between content-based and content-neutral regulation. After very briefly reviewing the nature of that distinction, I'm going to consider two related questions Turner raises with respect to how it operates. They are: (1) How should the Court treat a facially speaker-based restriction on speech -- as if it were content-based or as if it were content-neutral? and (2) If one way to decide the above question is to ask whether the justification for the restriction is content-based or content-neutral, then what counts as a content-based justification and what as a content-neutral justification? More specifically, does a justification relating to increasing diversity in the speech market count as content-neutral or content-based?

CB and CN restrictions: A content-based restriction on speech is just what it sounds -- a restriction on speech of a certain content; a content-neutral restriction on speech is a restriction that applies to speech regardless of its content. So if Congress passes a law prohibiting billboards, that's a content-neutral regulation; if Congress passes a law prohibiting political speech on billboards, that's a content-based regulation; and if Congress passes a law prohibiting speech favoring the Democratic Party on billboards, that's the worst kind of content regulation; it's a viewpoint-based regulation. Most of First Amendment doctrine today revolves around these distinctions. Content-neutral regulation gets relatively deferential intermediate scrutiny from the Court; content-based regulation gets strict scrutiny (and viewpoint-based gets a kind of super strict scrutiny that is always fatal).

How treat speaker-based? Now here is the first question Turner raises: how should the Court treat a speaker-based restriction? That is, take a restriction that by its terms restricts (or favors) not certain ideas, but instead certain speakers. (In my example above, consider a law that prevents corporations (corporate speakers) from using billboards.) That's the kind of restriction that Turner involved; its requirements had to with a certain set of speakers (that is, cable operators and programmers on the one hand, local broadcast television stations on the other) . Should the court treat such a restriction as if it were content-based or as if it were content-neutral? Does it depend? If so what does it depend on?

Like content-neutral: This isn't the first time the Court has run into the problem and it won't be the last. And though the Court's decisions have not been wholly consistent, there has been a kind of general understanding -- and Turner fits with that general understanding -- that subject matter restrictions should be treated more as if they were content-neutral restrictions than as if they were content-based. So Turner says as an initial matter that the terms of the law don't make reference to content; that they only make reference to speakers -- applying to all cable operators, cable programmers, local broadcasters irrespective of their message -- thus that the law is not presumed invalid.

Identity of who and what: Now there's a problem with treating speaker-based restrictions in this very simple fashion. There's often a close ~~identity~~ connection between who the speaker is and what the speaker says: between the identity of the speaker and the content of the message. (Sometimes there's a perfect correlation.) And if that's true, speaker-based restrictions often will raise the same concerns as content-based restrictions -- that these restrictions have arisen from a desire of the government to suppress certain ideas and that these restrictions will in fact distort public debate.

same concerns - skew + motive

Court says look to purpose: The Court in Turner is not oblivious to this problem. In response to the problem, the Court says it will look to the purpose of the law: if there's a content-based purpose, then the law will be subject to strict scrutiny, even if the terms of the law are only speaker-based. This is where the majority of the Court says that the government's justification did not have to do with the kind of programming local broadcast stations provide, that it instead had to do with the simple desire to preserve local broadcasting (that is, free programming) in the face of the bottleneck problem created by the structure of the cable industry. Because the purpose, according to the Court, is content-neutral, the restriction again need not face strict scrutiny.

Very difficult: But this way of dealing with the issue seems inadequate. The Court is really no good at investigating legislative motive directly -- nor could it be. Consider the case here. Maybe the purpose of the law was the one the majority picked. Or maybe not (the Court itself later admits that this purpose is not all that plausible because there's no reason to think local broadcasting is threatened). Maybe the law was just a product of the political power of the broadcasting industry. Or maybe the law grew out of the belief (as the dissent thought) that local broadcasting exposes people to particularly valuable, useful, educational programming. Or maybe, to be more cynical, the law grew out of the belief that local broadcasting exposes people to local programming, which benefits local politicians. The point here is that it's awfully difficult to say. And because it's so difficult to say, what the Court ends up doing is to say that there in fact was a permissible purpose when ~~there's~~ that there's really ~~only~~ a conceivable permissible purpose. The Ct can say

Better course: The result of all this is that speaker-based restrictions will be subject to relatively deferential review unless they're a fairly transparent subterfuge to promote or suppress particular ideas. And this is so even though as I said, the identity of speakers is often inextricably bound up with the content of speech. The better course would have been for the Court to say: "There are certain kinds of facial classifications that raise a danger of impermissible motive. Content-based classifications ~~obviously~~ do. Speaker-based classifications do too, although possibly to a lesser extent. We're never going to be able to determine this question of motive directly. Instead what we're going to do is to say that laws that on their face raise this danger are subject to some kind of heightened scrutiny, over and above what's given to pure content-neutral laws."

Better course continued -- options: That might mean treating all speaker based laws

as if content-based. It might mean establishing some kind of middle tier for speaker-based laws, as the Court seems gradually to be developing for subject-matter restrictions. It might mean treating speaker-based laws as content-based if but only if such restrictions correlate closely with specific, identifiable content. Any of these approaches would have been better than the one the Court picked, which is to ignore the generally suspect nature of speaker-based distinctions and subject each such distinction to review for impermissible motivation. instead

What's a content-based purpose; diversity? Now so far I've been assuming that we all know what we mean when we say that some purposes are content-based (hence illegitimate) and some purposes are content-neutral (hence legitimate). But it's pretty clear that the Court hasn't come close to figuring this out -- hence, the second question that I said I would talk about. In particular, it's clear that the majority is quite ambivalent -- and maybe quite confused -- as to whether it is a legitimate or an illegitimate purpose for the government to regulate in order to increase people's access to a variety of information sources and a diversity of views. Here, I fear I will overlap with what some other people are slated to talk about, so let me just say a very few words.

What Court says and tension: The Court says it's legitimate for the government to wish to retain local broadcasting and the free programming it provides. The Court goes further: it's legitimate and I quote to "promote the widespread dissemination of information from a wide variety of sources." But the Court seems to agree with the dissent that if Congress had considered the actual content of this programming -- whether it was useful or whether it was underrepresented in the speech market --that would have been impermissible. But what exactly does this mean? How do you promote diversity of view, variety of information without thinking about content? Doesn't the one include the other, at least sometimes? -- or at least doesn't any sensible conception of the one include the other, at least sometimes?

Tension again; must resolve: The key tension here is between (1) the ~~rights of~~ interests in access -- and the interest in diversity -- that the Court at least tentatively is recognizing in Turner and (2) the Court's longstanding distrust of any regulation that takes note of, accounts for, or emerges from the content of the speaker's message. ~~We will not know what Turner really means until the Court more explicitly takes up and attempts to resolve this tension, in the cable industry setting.~~

what Turner seems to say, most of all, is that the Ct has yet to reconcile or choose between these two: its distrust of govt + its understanding that govt may in some instances promote a well-functioning sphere of expression.

Work-in-progress

Pacing room

Simple or simplistic? Let me first state the thesis of this paper in a single sentence. The fact that I can state it in a single sentence may mean its beautifully simple or may mean its ridiculously simplistic -- I teeter back and forth between the two.

One-sentence version: The one-sentence version goes like this: An extraordinary amount of First Amendment doctrine -- and the most important parts of that doctrine -- can be understood -- more than that, can best be understood -- as an attempt to prevent government from taking action based on impermissible motives. Or, I can say that in another way, still one sentence: The point of First Amendment doctrine (or at least its primary point) is to separate out permissibly motivated government action from impermissibly motivated government action and to ensure the invalidation of the impermissibly motivated action.

Why important -- what courts say: Let me start by saying why I think this is an important thing to say. If you look at what courts say about the role of motive analysis in First Amendment doctrine, it's really quite all over the lot. There are some places and some contexts in which the court seems to be concerned about why government acted -- and where the court even says that that's what it's concerned about. On the other hand, you have this grand statement in *O'Brien* that at least when it comes to legislative action, the court can't look at motivation -- and that statement is understood to be the reigning law on this subject. So it seems as if there's some real uncertainty in the cases as to whether the courts should care about impermisible motive, what the courts can do to explore motive, and so forth.

Scholarly writing: Now when it comes to scholarly writing, I think it's fair to say that there has not been a lot of attention focused on the role of motive. That's not entirely true. Various pholosophical theories of free expression might, with some stretching, be labeled motivation theories -- Schauer, Scanlon, David Strauss. And then Geof and more recently Cass have discussed how some notion of impermissible motive plays into one part of First Amendment doctrine -- the distinction between content-based and content-neutral laws. But in general, scholars have tended to focus more on the effects of speech regulation than on its sources. Another way to say this is that scholars have tended to focus more on the value of speech -- why we should care that its being interfered with, whatever the reason -- and less on the reasons underlying the interference.

Effects and motive: In order to figure out whether First Amendment doctrine is animated by a concern about effects or a concern about motive, we have to have a better idea of what might count as impermissible effects and what

might count as impermissible motive.

Distinction as to ~~motive~~ effects: With respect to effects, what the paper does is to draw what has become a fairly conventional distinction between effects on a speaker and effects on an audience. (Don't worry so much about labels.)

Speaker perspective: That is: we might care about a speech restriction simply because it prevents would-be communicators from speaking. People get a certain value out of speaking (often phrased in terms of autonomy); a restriction prevents them from getting this value. What we care most about in this version of the world is giving as many people as many different opportunities to speak as possible.

Audience perspective: Or: we might care about a speech restriction because it mars or distorts -- makes worse in some way -- some realm of public discourse. In order to make decisions or in order to arrive at truth, people (the audience now) needs exposure to a proper range and balance of ideas. A speech restriction violates the Constitution when and to the extent that it prevents people from getting the information they need. So: what we care most about here is not giving everyone an opportunity to speak but giving everyone exposure to an appropriate range and balance of ideas.

Both effects theories: Now under both those understandings of what the First Amendment is about, we care preeminently about the effects of a speech restriction -- about its effects on the sum total of opportunities to speak or its effects on this thing called the sphere of public discourse.

Purpose as stronger explanatory factor: What the paper says is that First Amendment doctrine is better explained by reference to purpose -- not by reference to either of these sorts of effects (although there are clearly connections between the two an I don't want to minimize them). The actual doctrine does not attempt to ensure that the greatest number of expressive opportunities remain open. Neither does it attempt to ensure that the best possible world of discourse be created. What it does is attempt to ensure nothing about effects, but something about motive: specifically, it attempts to ensure that in restricting speech, the government isn't acting for an impermissible reason.

Displeased with discussion of impermissibility: Now: what would it mean for the government to restrict speech for an impermissible reason? I'm not particularly satisfied with this part of the paper; it seems to me very labored. On the one hand, I'm saying I'm not really justifying why this reason for restricting speech is so bad; I'm just doing some combination of extrapolating from some indisputable principles and working backward from the doctrine. On the other hand, the discussion is semi-justificatory; and it all seems just too wound up and -- well, labored -- to me. But the basic point goes as follows.

Censorial and noncensorial justifications: There are two broad categories of justifications for restricting speech: we can call them if we want censorial and noncensorial. The censorial justifications, I say, relate simply and solely to trying to establish or ordain orthodoxy. The government (or the public) approves of a certain idea and disapproves of another; hence the government favors the one and restricts the other. That is impermissible. But of course there are a whole range of other reasons for restricting speech. We might want to restrict speech because it's emotionally assaultive. We might to restrict speech because it will provoke violence. We might want to restrict speech because it will lead to some other violation of the law. All those sorts of reasons should be understood as different from the censorial justifications -- and as perfectly permissible.

Interconnected: Now the paper tries to make clear that I understand that these two sorts of justifications cannot be separated very easily; indeed, in large part the paper depends on that understanding of interconnection (because its that interconnection that makes any direct inquiry into motive futile). It is very rare that someone wants to restrict speech just because they don't like an idea. Usually they'll say: well, I want to restrict this speech, and I suppose you could say it's because I don't like this idea; but there's a reason I don't like this idea, and the reason is because it does some bad thing -- causes emotional harm, leads to violence etc. And most of the time people will not only say that; they'll really mean that.

But still separate: But all that said, I also want to say that censorial justifications are not entirely reducible to noncensorial justifications. In fact, the presence of censorial justifications -- the presence of distaste or dislike of ideas -- will make us assess harm differently and will make us evaluate differently the question when harm rises to the level where it justifies a restriction. Example: two demonstrations, one with speech you like, one with speech you don't; how close to riot before you call out the police? See civil rights demonstration cases.

Key principle: If that's all so, the key principle of 1A law is this: government cannot restrict speech if that speech is tainted by these censorial motives -- this wish to establish orthodoxy, this dislike or distaste for an idea.

Impossible to discover: But here's the rub: how in the world do we figure that out? I don't need here to go through the standard list of difficulties respecting the discovery of legislative motive. All those apply here. But now add to that the fact that in this context (for the most part) even the legislators -- even the people who have the motives -- can't really separate them one from the other (for the reasons discussed above). So how can a judge do so? And especially how can a judge do so if the judge herself has a set of attitudes about the ideas in question -- which, again, she herself cannot pick apart? Discovery of purpose in this context seems a hopeless enterprise. And indeed, we never see courts trying to do this sort of thing.

Indirectly through rules: But -- and here (finally) is the point of this paper -- we might be able to get to motive indirectly, through a set of laws that on their face have nothing to do with motive, but that are directed entirely towards the terms and effects of legislation. Those rules would enable us essentially to ask about motive without asking about motive. That's what I argue most of our First Amendment doctrine does.

Under- and over-inclusive; like presumptions: Before I give an example of how this works, let me just say that like most rules, these are going to be under and (especially) overinclusive. The rules will make errors. But they make fewer errors than a direct inquiry into motive -- and so we use them. In much the same way that in other areas of law, we have adopted various types of procedural mechanisms -- presumptions and shifting burdens of proof and such -- to deal with the difficulty of a person proving and a court finding impermissible motivation.

Example: CB/CN: Now an example -- and let me remind you again that the heart of this paper is really meant to lie in the examples. The most familiar example: the distinction between content-based and content-neutral regulation, of which RAV is one particular (though odd) instance.

CB/CN distinction: Explain the distinction: content-based vs. content-neutral. And then viewpoint-based as worst of all content-based.

Speaker interests can't explain: Why? Can't be explained by reference to speaker interests. Many CB laws will interfere with total speech opportunities less than CN laws. Use billboard examples. Then use RAV.

Also audience interests: Stone argument; but what of marginal (and greater CB effects of CN laws): Also can't easily be explained by reference to audience interests (although Stone says they can -- explain his argument). But -- some CB incredibly marginal -- see again RAV. By contrast, some CN have real CB effects. May not want to draw lines, but why not? Some don't seem so hard (again RAV). To extent we don't want to draw lines, it actually has to do with a fear of bias; and to extent we can say that, it's really motive that's driving the doctrine.

And Cass argument -- can't say it skews: More can be said. All above assumes that disparate treatment of ideas skews or distorts the speech market. But it may have the opposite effect -- see Fiss and Cass. Given all CN laws, speech market starts out skewed, this may unskew; see again RAV. Of course, may not want to give govt this power -- but again why not? for fear of improper motives animating govt action. Again, fear of motive drives the doctrine, not effects per se.

Purpose explains: Motive explains CB/CN distinction perfectly. When likely to fear impermissible considerations? When legislation affects only one idea. When least likely? When legislation affects a range of ideas. Subject distinctions fall somewhere in between the two.

CSI standard a way of showing good motive, of beating the presumption: Now of course we do allow CB regs -- when govt makes a great showing of justification. This is where govt rebuts the presumption. The presumption is of an impermissible reason. Govt comes back and says: emergency; proves we would be doing this even if we liked the speech.

Other examples to follow -- all major fault lines: That's one example. What the paper is supposed to do is to show that all the major fault lines of First Amendment doctrine can be explained in the same way (though haven't thought all of this through yet). At any rate, that's the basic point. Time for questions.

Presentation on Critical Race Theory/Derrick Bell

CRT and Bell: I was asked to talk today about a growing new movement in legal scholarship called Critical Race Studies. And I'm going to talk particularly about the person who can justly be labeled the founder and head of that movement -- Derrick Bell.

Remote from classroom? Now frankly, I'm not at all sure how discussion of the Critical Race Studies Movement or of Derrick Bell will help you in the classroom. I suspect that there won't be a very direct connection between what we'll do here for the next couple of hours and what you do in your classroom each day. I say that so you won't be disappointed if what I'm talking about here seems a bit remote.

Growing and hard to define: Critical race theory got its start in the late 1970s, perhaps the early 1980s. By now, many law professors all over the country -- most African-American, some Latino, some Asian -- would call themselves critical race theorists and say they're doing CRT work. Because of that, it's become increasingly hard to define or describe the movement. Each person works in some slightly different area and some slightly different way. Disagreements have developed among people who refer to themselves as critical race theorists. The movement has become more diffuse and amorphous.

Most general common questions and claims: Still some things can be said to define and describe the movement as a whole. Most generally, what critical race theorists ask about is how legal doctrine -- legal doctrine of all sorts, ranging from constitutional law to labor law, from criminal procedure to civil procedure -- reflects and perpetuates racial subordination in America. What most critical race theorists believe is that law, in a variety of ways, works to maintain the subordination of members of minority groups. And what most critical race theorists believe is that the achievment of racial justice in this country, if possible at all, will require not merely the more even-handed application of current laws -- that will do less than nothing -- but a root and branch transformation of the legal system.

Four features: More specifically, works of CRT often share four common features:

Pervasiveness of racism: First, CRT takes as a given -- as its first premise -- that racism infects every aspect of American law and Amercian life. That racism is deep and pervasive -- some would go so far as to say inevitable and permanent.

"Neutral" law as mechanism of racial subordination: Second, CRT attempts to show that the claims of the legal system to neutrality, to impartiality, and to objectivity are false claims. CRT attempts to show that the law -- even

when it seems neutral and even-handed -- in fact works in the interest of dominant groups in American society and particularly in the interest of dominant racial groups.. CRT attempts to show that the so-called "logic of the law," that so-called "neutral principles" are a sort of cover for a deeply ingrained system of racial domination.

Critical of civil rights strategies: Third, CRT generally is extremely critical of the activity -- the strategy and even the goals -- of the traditional civil rights movement. The thinking here is that the traditional civil rights movement believed that all that needed to be done was to make the laws neutral -- to end legal segregation in the schools, for example -- in order to achieve racial equality in America. But such reforms, critical race theorists say, were ineffectual, and necessarily so -- because they ignored the way even neutral laws could effect racial subordination. In addition, it might be said that critical race theorists see the civil rights movement as too "reformist," too "gradualist," not sufficiently committed to the broadscale social transormations necessary to achieve racial equality.

Insistence on incorporation of minority perspectives and use of stories: Fourth, and relatedly, critical race theory insists that the law -- legal doctrines of all sorts -- be reformulated, fundamentally altered, to reflect and incorporate the perspectives and experiences of so-called "outsider groups," who have known racism and racial subordination at first hand. Critical race theorists often write not in traditional, lawyerly terms, but with parables, and stories, and dialogues. The thinking is that these techniques can better demonstrate the actual experiences of members of minority groups -- experiences which should be accepted by and incorporated in the law. In addition, the decision to spurn traditional techniques of legal argument reflects the belief that these apparently neutral techniques are not neutral at all -- that they have been the means of promoting not some objective system of truth and justice, but instead a system based on racial power.

Derrick Bell as exemplar: Now Derrick Bell's writing illustrates each of these four aspects of critical race theory. He believes that racism is a pervasive -- and a permanent -- aspect of American society. **Read 1.** He believes that the legal system is a means of promoting a system of racial subordination -- even, or perhaps especially, when it makes claims to objectivity and neutrality. **Read 2.** He is deeply critical of the strategies and goals of the traditional civil rights movement -- of which he used to be a part. And he insists that law must take into account the experiences of minorities, which he attempts to explicate through dialogue and stories.

Biographical background: First, a little biographical background. NAACP Inc Fund -- doing school desegregation. Then one of first A-A profs at Harvard. Then, one of first A-A deans -- at Oregon. He left Oregon over a dispute about whether to hire an Asian-American woman, returned to Harvard.

Disputes over series of African-Amer women (Harv has none). (Participated in sit-in in Dean's office; Clark: "wish he'd figure out that Harvard is not a lunch counter.") Went on leave til Harvard hired. Still not happened; his leave time ran out; now at NYU.

Structure of two books: Two books; both follow same general structure. Geneva Crenshaw talking to a fictional, ever hopeful "Professor Bell."

Education "story": Story I gave you is less storylike than most; in fact, hardly a story at all. But I picked this one because it deals with education -- specifically with the effort to desegregate schools in this country and the result of that effort. In this story and the dialogue that follows, Bell seems to me to make the following two crucial points:

Desegregation benefitted blacks least: First, the struggle to desegregate the schools has benefitted least the black children it was supposed to help. Whites have used desegregation mandates to achieve educational reforms for themselves, while ignoring the needs and grievances of the black population. All too often, desegregation proved no help -- and sometimes a real harm -- to black schoolchildren.

Error of civil rights movement: And second, as the results of the desegregation imply, the civil rights movement committed a real error in devoting such time and expense to the mere goal of integration. The movement confused integration (racial balance) with what children need- effective education. **Read 111.** They chose this mistaken course precisely because they took a too-optimistic view of the extent and strength of racism in American society; they throught that once racial balance had been ordered, the system would become non-oppressive (instead of the system simly finding another way to opporess black children). The civil rights lawyers would have been better off insisting on greater funding and control of traditionally black schools, with mandated desegregation only a long-term goal.

Essential message: Essential meesage here is on page 118. **Read 118.**

Pose some questions: Now I was hoping we could get a discussion going on some of these points, and I thought I would try to set it up by posing the following sets of questions. I'm going to pose the questions in a general way, but it may be that the best way to address them is by reference to the particular problem of education. I am sure that as schoolteachers, you will have a lot to teach me on that score.

Racism permanent? First, is racism not only as currently pervasive, but also as inevitable and as permanent a part of American life as Bell and the critical race theorists believe? If it is, is recognition of this fact a counsel of despair, suggesting that further struggle is hopeless? Or is it instead the realistic

understanding that any movement needs in order properly to set its priorities and choose its strategies?

Law as means of racial subordination? Second, does law serve as a means of perpetuating a system of racial subordination? Are the claims of our legal system to neutrality and objectivity mere camouflage -- a sort of cover for the promotion of the majority's interests?

What legal strategies? Third, what legal strategies should members of minority groups today adopt -- what legal reforms (or transformations) should they press for? Did the old civil rights strategies work? Are they still working? If they should be replaced, what is the alternative?

Critically important questions: Those are the questions that Bell and other critical race theorists pose. There is no doubt that they are the among the most important questions -- if not the most important questions -- in all of American law.

Visiting Committee Lunch Speech

According to longstanding tradition, a new member of the faculty addresses the visiting committee at this lunch. So when Randolph Stone got the nod last year, I thought my single opportunity had come and gone. No such luck.

We actually do have two new members of the faculty this year -- sort of. The problem is that one, Ken Dam, isn't really new. He previously served on the faculty for many years. And the other, Mark Ramseyer, we don't really have yet. He decided to stay in Japan until next month. I've been wondering whether someone told him about this tradition.

Theat leaves me and Larry Lessig as the closest thing Chicago has to new faculty members. I think the reason I (and not Larry) was chosen for this high honor has something to do with the fact that, when Larry and I arrived last year, he was chosen to be faculty secretary -- another high honor that involves tabulating and recording the votes at faculty meetings.

When Larry was chosen to be secretary last year, I thought it was a pretty good thing. First, of course, because it left me with nothing to do. But also because I thought it showed some sensitivity on Geof's part to how it might look if he chose, from three incoming faculty members, the single woman to take dictation.

But since then, and especially since I was asked to give this speech, I've had second thoughts. Because one Chicago Law Scool tradition involves letting the Dean do everything. So we really don't have many faculty meetings. And another Chicago Law School tradition involves consensus and collegiality. So all are votes -- at least since I've been here -- have been unanimous. So I'm not sure what Larry does -- but I'm quite sure I've gotten the worse of this deal.

The tradition of having a new faculty member give this speech, when you think about it, is really rather odd. Take a person -- usually a completely new person -- a person who doesn't know anything about the University of Chicago Law School. Take that person and tell her to make some intelligent, but of course flattering, remarks about the Chicago Law School to the members of the visiting committee.

You can see why some law schools would do it that way. For example, I went to Harvard. This would be a perfect tradition for Harvard. Because it seems to be true -- ask anyone -- that the longer you stay at Harvard, the less you can remember about what attracted you there in the first place.

But Chicago -- I think Chicago's quite the opposite. Chicago grows on you -- week by week, month by month, and (I hope) year by year. Which means that

you might get a more starry-eyed speech from me today than you've heard in the past, from people who just arrived, or than I would have given last year.

Rather than just gush indiscriminately, though, I thought I'd try to give a little focus to my remarks -- and I thought the way to do that would be to read the MacCrate report, which Geof had told me was the subject of this year's visiting committee session. So a few weeks ago, I read the report, with the intention of saying something about what it said.

Now by this time, you've spent a lot of hours talking about what the MacCrate report said. So doubtless you're all going to be glad to hear that I changed my mind. I changed my mind because what most struck me about the MacCrate Report was not what it said, but what it didn't say -- the trend in legal education that it completely missed.

If you read the MacCrate report, this is the picture you get of legal education: Students are taught in their three years of law school the methods of legal analysis, as well as legal rules and principles. They are taught these things by faculty members who care about the discipline of law. Students are not taught how to negotiate deals or how to counsel their clients or how to manage their offices -- and, according to the MacCrate report, this is a problem. But the one thing they are taught -- the one thing we don't have to worry about -- is legal analysis and reasoning, and the substantive rules of law.

Well, I have to say that I want to know what law schools the MacCrate Committee looked at before writing its report. Because it seems to me that the Committee wholly misunderstood the current state of legal education and thus misdiagnosed the problem.

The real problem with law schools today is not that they don't teach factual investigation and negotiation and counseling. The real problem with law schools today is that, increasingly, they don't teach law -- that they don't value law as a discipline and that they see as old-fashioned or as intellectually bankrupt teaching that focuses on the method of legal analysis or the substance of legal rules.

Last year, for example, I had occasion to look at the transcript of a student from an unnamed but famed school -- in New Haven -- whom we were considering hiring. The student had taken eight what are called university courses: these are courses that don't have anything to do with law. She had taken four independent research courses. These are courses that don't have anything to do with anything. Altogether, she had taken four -- count 'em four -- courses after the first semester dealing with substantive law. She did though know a lot about such things as the Heuristics of Post-Structural Meta-Procedure.

But I'm not just talking about the non-law courses that law students at

many schools seem to spend much of their time taking. What's worse is that even in courses with names like Torts and Evidence and Federal Jurisdiction, many professors at many law schools have very little interest in examining legal principles or instilling a grasp of legal methods. These professors are bored by law, and they communicate that boredom to their students. They feel disdain for the legal profession, and they communicate that disdain to their students. They behave as if to teach law, let alone to practice law, is to do something pedestrian, beneath the notice of the true intellectual.

Except, of course, at Chicago – and here, I'll throw in a personal story. At the same time, I applied to Chicago for a teaching position, I applied to a number of other schools. My first interview was with a school which will remain nameless but which is located in Ann Arbor; I went up there and talked to some people and thought I had done pretty well. But about two weeks later, I got a call from the chair of the appointments committee, who told me it wasn't going to work out after all.

Now I had some interviews coming up, and I was interested in finding out what I could do better. So I asked him what I had done that I shouldn't have, or what I hadn't done that I should have. And he said -- "well, it really wasn't anything like that – it wasn't that you did something or that you didn't do something. It was really just who were you were." And I said, "Oh?" And he said, "yeah, we thought you were ... well, we thought you were very much a lawyer."

Then he went on -- he asked me -- "Have you been to Chicago yet?" I said I was going in a couple of weeks. And he said, "You know, I think you're going to do really well there; in fact, I think they're going to hire you -- because at Chicago, at Chicago, they don't mind that kind of thing."

Well, here I am, so I guess they don't. But I'm hardly the only proof. Last year, we had a visitor here from another law school – a law and economics scholar. One day we got into a discussion about the differences between the two schools, and he said what struck him most about the Chicago was the kind of discussion that took place at the roundtable, the famed institution where Chicago faculty members eat lunch.

Now I have to admit that when he said that, I thought he was referring to the speed and volume of the conversation, to the incessant interruptions, to the impossibility of getting a word in edgewise. But it turned out he was talking about the substance of the conversations. What amazed him, he said, was that we talked about law -- cases before the Supreme Court and such things. "Well," I asked, "what do you talk about at your law school?" "Not law," he said; "that would be thought unacademic."

And finally, a last appointments story, this one with me on the other side.

In the fall of last year, we interviewed an entry-level candidate. After the interview, I ran into Richard Epstein and asked him what he had thought. "Terrible," he said, "just terrible." (Except he said it faster than that.) I asked him why. "Would you ever," he asked me, "would you ever hire that man to be your lawyer?" I told him that I wouldn't, but that I didn't know if that was the proper criterion. He said: "it's not the only one; but it's absolutely indispensable."

Now, in all candor, I'm not sure it's indispensable. Maybe, just maybe, if it were, there'd be one or two people even here whom we'd have to fire. And in telling these stories, I don't want to be understood as saying that law professors should focus in their teaching (or, of course) their scholarship) on the exact same questions as practicing lawyers. Nor do I want to be understood as saying that law professors, again in their teaching or their scholarship, should blind themselves to insights from other academic disciplines. This is, after all, the birthplace of law and economics. And it's a place where I and many others concern themselves with and try to teach matters of "high theory."

But I suppose I do want to say that law schools, at a minimum, should take law seriously and care about it desperately. That law professors should view themselves as part of a broader profession, all of whose members take part, although in different ways, in a common enterprise. That law professors should train students to take their place in that profession. That, to this end, law professors should educate students both in methods of legal reasoning and in substantive legal principles. That law schools should be, primarily, about the law and that they should feel no shame in this mission.

Law schools today, especially the best law schools, are drifting away from these principles. They are turning their backs on the legal profession, on the study of the law itself. That, it seems to me, is the gravest problem in legal education. It is what the MacCrate Report should have addressed. And it is why I am overjoyed that this school overlooked my lowly status as a lawyer and decided to hire me anyway -- because it is a problem that this law school, perhaps alone among schools of its caliber, simply does not have.

LEGAL ISSUE

I thought as the only lawyer and law teacher on this panel, I should spend my time talking about a case -- a case that asks about the legality -- not the propriety, not the desirability but the very legality -- of a schoolboard policy removing certain books from the schools.

CASE

The case is called Board of Education vs. Pico. The school board involved made a decision to take 9 books out of the library -remove them from library shelves. Among the books were: Slaughterhouse 5, by Kurt Vonnegut; Soul On Ice, by Eldridge Cleaver; and Go Ask Alice. The schoolboard explains its action by saying that these books were, and I quote, "Anti-American, Anti-Christian, anti-semitic, and just plain filthy" The case got to the S. Ct. which had to decide whether this action comported with the Constitution -- specifically, the First Amendment.

FUNDAMENTAL TENSION

Now in deciding that question, the S. Ct. had to confront what I believe to be the fundamental tension in this area. On the one hand, public schools, like all institutions of government must comply with the command of the First Amendment and the principles underlying that command: a commitment to freedom of inquiry and diversity of view and a promise to act in neutral manner toward the range of ideas -- good and bad, true and false, that exist in our society. On the other hand, ~~by~~ schools - by their very nature and purpose - must teach, must inculcate certain values and views -- those which society at large believes most appropriate (in the den of its various people). How are schools to reconcile these two sets of purposes and obligations?

BRENNAN OPINION

In the case, Justice Brennan wrote an opinion disapproving the Board's action. He pointed out that these books were not textbooks but library books. Although the Bd had great freedom in picking textbooks, it did not have the same freedom to pick and choose ~~textbo~~ library books. He then said that with respect to library books, the critical question related to the purpose of the schoolboard. If the Board removed the books because they were "educationally unsuitable" or even because they were "pervasively vulgar," then the decision complied with the 1A. But if

the ideas in them, then the action violated the 1A. (Query ~~what~~ whether the ~~the~~ a difference between the two.)

DISSENT

The dissent took Brennan on all counts. First, it said that if the govt could choose which textbooks to use, then it surely could choose which library books: after all, it was textbooks that posed the greater danger of "imposing a pall of orthodoxy over the educational process." More important, the dissent said, imposing orthodoxy was perfectly permissible in the schools. Schools impose orthodoxy all the time; indeed, schools are supposed to ~~do exactly~~ ~~this~~ impose orthodoxy.

The dissenting Justice wrote that he would allow schoolboards to remove books "because they are indecent, because they extol violence, intolerance, and racism, because they promote ideas and values repugnant to a democratic society.

And the dissent continued:

It is permissible and appropriate for local boards to make educational decisions based on their personal, social, political, and moral views. Libraries serve as part of schools' inculcative role. They are not designed for free-wheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas

exhibiting pathologies of society in a / what the censors / think most threatening + / most fears + anxious about

CONCLUDING QUESTION

I'd like to conclude by asking you to consider which view you agree with and by suggesting that all of the school teachers in this room are in as good a position as the US Sup Ct Justices to decide this legal question. Because as should be obvious, the question does not depend on legal niceties. It rides on different views of public educational institutions and their roles -- specifically, in what measure public schools are institutions of value neutrality and in what measure they are institutions of value inculcation. That's the question of this case -- as it is the question underlying most school censorship issues and controversies.

Uphld but unmoved

Were I a judge, I believe I would have upheld Professor Gray's "hate speech" — or should I say, "harassment" — regulation. But I must admit to feeling profoundly unmoved by the story of its invalidation. ⁂

Why unmoved

Unmoved, if this is syntactically possible, on two different levels. First, on the doctrinal level, because whatever mistakes the court made, in the scheme of things — as I think Prof. Gray would agree — relatively minor. Second, on the practical level, because the existence or non-existence of this regulation cannot be thought to have any real consequence, except to the extent that discussion of it diverts attention from matters of greater import and strategic benefit.

Two reas

First, some doctrine. As I understand it, Prof Gray thinks the court's doctrinal analysis was flawed, for two reasons. He also provides a third, far more radical critique of what the court did. I'll save discussion of that for a bit later and focus on the more conventional critiques, right now.

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Incid restraint!

First, Prof Gray says, the court failed to understand that this was an incidental restraint — because a generally applicable law. True, the law talked about speech in particular — but only in the context of

talking about much else. The code covered harassment; included w/in that category was harassing speech and harassing conduct. This was not a speech code, but a harassment law, that in the interests of clarity -- usually a virtue of regulations affecting speech -- ~~broke down into~~ separated out the variety of verbal and non-verbal acts falling within it.

Assumes correctness of key distinction

Now it's important to understand that this argument assumes that a great deal of 1A law - a fundamental distinction of 1A law - is right on target. That is, the argument assumes the correctness of a distinction between direct & incidental restraints between laws directed at speech and conduct and laws targeting speech alone.

SKIP

Which box?

The question that Prof Gray believes the Ct got wrong is a question of which box a close-to-the-line case properly falls in. We are presented w/ dusk - we must decide if it's closer to night or day. The Court says night (direct restraint); Prof Gray says day (incidental restraint). Who is right?

SKIP

Ct is right

My sense, though it is not a strong sense, is with the Court. It was

* responds to the likelihood of ideological hostility entering into governmental action.

when I read G's description of the policy; it was, even more, when I read the policy. The rationale for the doctrine of incidental restraints ~~goes something as follows~~: when a law focuses on nonexpressive conduct, restricting speech as an incidental and covert matter, the probability increases that a legislature, or other govt actor, will consider the regulation divorced from hostility toward a message. But once a law specifically calls attention to expression, even as among other things, this probability begins to slip. And if the law - as this policy did - focuses on speech, making clear that it is a product of balancing the value of certain ideas against its harms, then we are not too far from a direct restriction - i.e. a speech code.

That, as G says, greater effect on exp (bec vagueness + anti) Extremely interesting point! 1) not true of all GALs 2) shows how 1A-law is obsessed w/ motive

Minim impact Accept: soundness relevance to sex har law

CONTRA-? - like making/land awfully hard for herself. ↓ some complexity, but

But G's and my other disagreement on this score seems to me of minor importance. Both of us accept that the line between incidental and direct restraints is a sound one. Both of us accept that that line is the critical doctrinal feature for purposes of determining the constitutionality of harassment laws. Both of us accept that this set of categories protects much if not most sexual harassment law. Both the lower ct and the SCt (Harris) agree with all this.

Confusion; drafting error What is left is little more than a caricature of the doctrine

- indeed, a drafting problem. It is a dispute of some, but not large, doctrinal significance. It is, in short, as a matter of pure doctrine, nothing to get excited about.

RAV exceptic

Second, C objects to the lower ct's decision — as he objects to RAV itself — on the ground that the policies at issue fall w/in one of RAV's (many) exceptions: that for a subcategory of unprotected speech where the reason for the category itself apply w/ special force. Example — the most prurient + offensive obscenity.

Diversion: I love RAV.

It did miss ball.

Now I do think the Ct missed the ball here: This is why I might will have upheld the Stanford policy. It seems to me entirely right when he says that the reasons for regulating fighting words have especial force when those words are race — or sex-based. Scalia got the principle, but missed the application.

Why missed?

I ~~actually~~ think he missed it for a different reason than C. On C's reading, whenever the special reason for the regulation derives from the content of speech, the special reason can't justify a special regulation.

But This would rule out most of the examples Scalia uses (like prurient obscenity). Scalia didn't see this case as falling w/in the exception because Scalia didn't see any special harm. This was a result 1) of his narrow conception of fighting words and *2) his insensitivity to race-based harm. A mistake, an unfortunate mistake, but not one driven by the structure of the doctrine.

perhaps most jump-doctrinal point G makes.

Not a hard challenge

~~And even if G is right on This limited point, still what I am saying holds: the~~ CFS criticisms of the CT in this case, even of The Ct in RAV, do not represent a challenge to the essential doctrinal categories, to the lines drawn by the doctrine. They are criticisms only of decisions to place something in one category or another. Again, as a purely dochinal matter, This seems of some interest, but no major consequence.

(I'll do on time)

At-a hard challenge

At one point in his paper, G suggests the stakes are higher - that the Court was wrong for more than these minor reasons - that in fact the very foundations of 1st Amendment law are ripe for challenge. This is, of course, when G makes the point That conduct (here, discrimination) also may cause expressive harm - stigmatic injury. If we pro-

that conduct on this basis – which we do – why not also speech? ~~Here the walls of the law come tumbling down.~~

True abstract: Now everything G says here is true. And we can indeed abstract this point and say that both conduct and speech often cause identical expressive and unexpressive harms. This is not only a phenomenon we see w/r/t discrimination; it exists all over.

What follows? lots: But what follows from this? G's analysis would allow the prohibition not only of fighting words, but of all speech that causes stigmatic injury. Likewise, more generally, we could prohibit any speech wherever we regulated conduct in part for communicating a message. There would be no stopping point.

G admits – back to current law?: And G knows and admits this. He says: Read 33. But what is that truce line? In the end, G brings us back to current doctrine. What he would change, or so it seems, is not fundamental doctrinal structure, but some perceived misapplications of that structure. This is good + interesting but, as I said, in the scheme of things a relatively narrow, fecundy minor criticism.

an insightful one can't do anything w/ UNLESS INSIGHTS

Sensible, but no doctrinal contradiction

Don't mean to say such criticisms are a waste of time - lots of times much more sensible. Only thing I wish to point out is that even if O & Sun's, the ct got it wrong (or right but it partly wrong) - there is no speech cannot be criminalized.

No practical consequences (empirical assumpt)

Of course, if these small doctrinal mistakes had large practical consequences, Then that would provide good and sufficient reason to care about them. But I suspect this is not true. I am of course making some empirical assumptions here, as is often true in IA law. It is good to admit there are guesses up front. But ...

Move to the "political"

Has a policy

Consider first that Stanford, even w/out this policy, has an anti-harassment policy - see FN 13 - Gerhard Casper. This, I may say, is a real generally applicable law. Stanford has it - and G himself admits that it can probably cover more speech than his own policy.

Trivial speech GATES

Even putting this to one side, The kind of discrim. sp. This policy covered is perhaps the least invidious, least harmful of all. G. hints at this at the very end of his article when he writes READ 58. Indeed, the very presence of this sort of speech -- and our distaste for it -- sometimes helps to enforce community norms. It is at any rate not the real evil, nor does it cause the real harm.

-

Esp as compared to other sorts of discrim.

And much the same point seems even clearer when we compare this single act of discriminatory speech to all the

Refer to Gates

other kinds of discrimination in the world. G notes that attacks on S's code were linked to attacks on affirmative actic; I suspect this is true — and no less true that defenses of that code were linked to defending affirmative actic. But consider, then, what was really happening: A serious + extremely consequential debate about race on campus was diverted onto another field, where the stakes were nowhere near so large.

Fighting on stupid battle-ground.

Of course, fighting ~~one~~ on one battleground may or may not prevent you from also fighting well on another. In this case, I think it clearly does. Because what is striking about this diversion is not only that it is a diversion — but that it takes place seems to
in the one place where the opposition occupies the high ground. Such policies turn race issues into speech issues, ~~from~~ more, convert the ugliness of racism into the nobility of constitutional ~~right~~ principle and right. This seems a sharp spot for +gender
progressives to mount an attack on race privilege.

Why? Don't know how to solve/talk about

I suspect that it benefits both sides choose to fight public battles here — seemingly irrespective of tactical advantage — because neither knows how to contest

the larger issue of race and gender inequalities in our society. That issue is too big. We don't know how to solve it. We don't even know how to — or perhaps we are afraid to — talk about it. And so, are free enterprises over things like ~~[illegible]~~ the Stanford policy — where ~~each of us in our own~~ The ground seems safer, the issues more contained. The ability to do something ~~ways, on different sides, can achieve a good~~ more clear.
~~contribute~~

Don't mean to say!!! But don't lose perspective

In saying all this, I do not mean to say that there is no such thing as discriminatory harassment — or that it causes no harm. I do not mean to argue that it should be ignored — or that the IA commands we ignore it — where it occurs. I mean only to point out the possibility of losing perspective in this area — and to hint that Stanford and other univs — lost it in adopting and defending such ~~this~~ policies. As I said, I think I would have upheld the policy — but I would have done so in the firm conviction that little of consequence would flow from it.

This one it seems to me consistent with, rather than fundamentally challenging of, current doctrinal rules + categories.

Ultimate lesson.

But I think the ultimate lesson of the Stanford policy may be (that we should) resist the temptation to fight on this ground: to retain perspective about what's more and less important.

As I noted I would have upheld the policy; it does seem to me essentially consistent w/ current + appropriate ~~fundamentally subversive of~~ 1A law. But I wouldn't have drafted the policy in the 1st place. Now, I have to tell you, as it does to Prof 6,

THE WHITE HOUSE

Eric –

Attached are copies of the notes I have for speeches, seminars, etc. I'd appreciate your reviewing them.

Elena

THE FIRST AMENDMENT AND NEW TECHNOLOGY
Speech to NAA, NAB, LDRC

Academic hat: Before I do anything else, I should make a comment about what hat I'm wearing today. As Dan has said, I'm currently serving as an Associate Counsel to the President. But in what I continue to regard as my real life, I'm a law professor. And it's in that capacity I'm speaking you today. Dan asked me to do this when I was a law professor; I agreed when I was a law professor; and everything I'm going to say is said as a law professor, not -- not, not, not -- as a White House aide.

Speech as described: Now when Dan asked me to give this talk, he described it as the time when an academic stood up and talked about the Supreme Court's most recent rulings on libel law. And in the absence of any recent rulings on libel law, it was the time an academic stood up and commented on the direction in which the Supreme Court was going in First Amendment cases generally.

No libel: But as I was thinking yesterday about what I was going to say here, I thought neither of those would be a very interesting talk. The Supreme Court issued no defamation cases this year. The important things that happened in the field of defamation seemed this year to happen more in the settlement room than in the courtroom. And doubtless, all of you could tell me more about those things -- or that one big thing -- than I could tell you.

Not much else: And with respect to First Amendment law generally: frankly, the Court did nothing terribly exciting this year. It decided a lot of cases. But none of those should have been surprising. In Rosenberger, it reemphasized what has become the keystone of First Amendment doctrine: the strict presumption against content-based -- and even more, against viewpoint-based -- discrimination. In other cases, the Court reminded us of the different standards of review applied to high-value and low-value speech: although the restrictions in both cases were struck down, compare the Court's analysis in McIntyre, involving anonymous political speech, with the analysis in Coors, involving commercial labeling and advertisements. In general, what we saw in the Court's First Amendment cases this year is a real stability in the doctrine -- broad agreement on basic principles and even on many of their applications.

But technology changes: Now where does that leave me in terms of something to talk about? Well, if the doctrine of free speech hasn't changed much recently, the technology of speech is changing all the time -- indeed, it seems, at an

ever-accelerating pace. And the next great challenge for free speech law is for it to figure out how to deal with these changes in technology. I note that may of the panels in this conference involve that question. And I thought I would spend my time discussing it too.

New ways to restrict speech: It seems to me that there are two ways technology can affect the law of free speech. First, technology can provide new ways to restrict speech. Think of the V-chip. Perhaps our new ability to manufacture such an instrument will minimize the desire for, obviate the need for, more direct restrictions on speech. But perhaps too this new ability -- and others like it -- will open up new opportunities, new ways, new methods of, if not censoring, at least influencing the sphere of public discourse. As these new methods arrive on the scene, one of the most important challenges for the Court is to be able to see them for what they are. Simply put, the Court may have to learn to recognize technologically advanced forms of speech regulation.

New speech; small and big questions: Second, technology can provide new ways to speak, which themselves seem to call for some change in First Amendment doctrine. Now there are a set of small questions here, and then there's a bigger broader question. I'll deal with each in turn.

Small questions: The small questions are ones of application: how do we apply the basic principles of free speech law to new technologies and new situations. All of you, lawyers and journalists, are probably aware of more of these questions than I am. But here are just a few examples. First, do we hold liable the owners and/or operators of bulletins board and electronic mail services for what is said in those places? (The answer to this question itself may rest largely on the state of technology; it depends -- or should -- on whether the carrier of speech has available to it cheap and effective ~~messages~~ methods of detecting and stopping unlawful messages.) Second, how do we use the community standards prong of the obscenity test in cyberspace? Which community do we look at? Surely not where the community is downloaded? If not that, then what?

Small potatoes: But all this is relatively small potatoes: the kinds of questions courts and lawyers must answer every day. Always, courts must figure out how to adjust basic principles and rules to new contexts, whether created by new technology or otherwise. Such questions may be tricky; they may be important; but they are in essence common.

Big question -- change in basic principles? The broader question is whether these emerging technologies call for a whole new set of normative structures and frameworks; whether they demand not the application of old principles

but the embracing of new principles. At the beginning of this talk I talked about how stable First Amendment doctrine was. In some sense, the question here is whether this stability ~~is a good sense~~, given revolutionary changes in technology. Do such changes require revolutionary changes in law?

Three answers: There are three possible answers to this question: yes, no, and wait and see. In the remainder of my talk, I want to discuss these three answers very generally, without coming down firmly in any one camp or the other.

Basic change required: The affirmative answer holds that existing speech law assumes certain methods of communication; that emerging are wholly new methods; that if the law we have is applied to these new methods, the balance we have struck between speech and competing interests -- the accommodation we have reached -- is fundamentally changed and subverted. For example, we have deemed a particular kind of balance appropriate with respect to the interests of speech and reputation. But what happens now that a libelous statement, by a single irresponsible individual, can with no cost at all and by a touch of the button reach literally millions of people. If we apply old rules of defamation law, notwithstanding the technological realities, have we not truly altered the preexisting balance between expression and other values?

Not. (1) Courts don't do well. The negative answer -- which is perhaps the answer suggested in the Court's opinion in Turner from two terms ago -- responds in several ways. First, we might note that in the free speech area and in others, courts have not proved proficient in perfectly (or even imperfectly) understanding new technologies and their implications. For example, did the scarcity rationale ever make sense with respect to broadcasting? Perhaps courts should only with great forethought and caution determine that new technology demands a new legal framework.

(2) No real revolution: Second, perhaps this supposed technological revolution is not so revolutionary after all. Let us grant that some speech now becomes cheaper, faster, more potent and effective. So what? It has always been true that some speech becomes -- then for a time is -- cheaper, faster, more potent than other speech. The technological changes we are seeing now are no different from many others that have occurred in communications history. ~~So too we have always had disparities in the ease and effectiveness of different kinds of communication. This~~ is nothing new under the sun; it certainly does not require fundamental changes in First Amendment doctrine.

(3) Revolution makes current law better. Third, maybe we can reverse the argument: the technological changes we are

seeing today do not demand a change in First Amendment law; rather, they provide a surer basis than ever for current First Amendment doctrine. How could this be? Because the doctrine today is in many respects based on a set of fictions: that speech opportunities are available to everyone; that speech can be met with counterspeech; that because of some rough equality in access, the marketplace of ideas largely works. It's important to note that these are fictions, though perhaps necessary ones. The point I want to make is that technological changes may make these assumptions less fictional and more real than ever before. By making speech cheaper and more accessible, technological changes may improve the working of the marketplace of ideas. And if that's true, new technology will have helped the real world of speech catch up with First Amendment doctrine.

Wait and see. But perhaps we can't yet know which of these alternative positions -- as to whether we must fundamentally change First Amendment doctrine -- is correct. Perhaps we can't yet know because we don't know what this technological revolution is yet, or where it will take us. Hence we might adopt a sort of "hedge your bets" solution: let the pot simmer, see where these technological developments lead, refuse to commit, for as long as possible, to one approach or the other. This may seem the fearful course, but it may be wise one, given the speed with which communicative technology is changing, and the uncertainty that the world of expression tomorrow will remotely resemble the one ~~we have today~~ which we are familiar with.

Remarks on Turner

Brief overview of two questions: I've been asked to talk about Turner as it relates to the most fundamental distinction in current First Amendment doctrine: the distinction between content-based and content-neutral regulation. After very briefly reviewing the nature of that distinction, I'm going to consider two related questions Turner raises with respect to how it operates. They are: (1) How should the Court treat a facially speaker-based restriction on speech -- as if it were content-based or as if it were content-neutral? and (2) If one way to decide the above question is to ask whether the justification for the restriction is content-based or content-neutral, then what counts as a content-based justification and what as a content-neutral justification? More specifically, does a justification relating to increasing diversity in the speech market count as content-neutral or content-based?

CB and CN restrictions: A content-based restriction on speech is just what it sounds -- a restriction on speech of a certain content; a content-neutral restriction on speech is a restriction that applies to speech regardless of its content. So if Congress passes a law prohibiting billboards, that's a content-neutral regulation; if Congress passes a law prohibiting political speech on billboards, that's a content-based regulation; and if Congress passes a law prohibiting speech favoring the Democratic Party on billboards, that's the worst kind of content regulation; it's a viewpoint-based regulation. Most of First Amendment doctrine today revolves around these distinctions. Content-neutral regulation gets relatively deferential intermediate scrutiny from the Court; content-based regulation gets strict scrutiny (and viewpoint-based gets a kind of super strict scrutiny that is always fatal).

How treat speaker-based? Now here is the first question Turner raises: how should the Court treat a speaker-based restriction? That is, take a restriction that by its terms restricts (or favors) not certain ideas, but instead certain speakers. (In my example above, consider a law that prevents corporations (corporate speakers) from using billboards.) That's the kind of restriction that Turner involved; its requirements had to with a certain set of speakers (that is, cable operators and programmers on the one hand, local broadcast television stations on the other) . Should the court treat such a restriction as if it were content-based or as if it were content-neutral? Does it depend? If so what does it depend on?

Like content-neutral: This isn't the first time the Court has run into the problem and it won't be the last. And though the Court's decisions have not been wholly consistent, there has been a kind of general understanding -- and Turner fits with that general understanding -- that subject matter restrictions should be treated more as if they were content-neutral restrictions than as if they were content-based. So Turner says as an initial matter that the terms of the law don't make reference to content; that they only make reference to speakers -- applying to all cable operators, cable programmers, local broadcasters irrespective of their message -- thus that the law is not presumed invalid.

Identity of who and what: Now there's a problem with treating speaker-based restrictions in this very simple fashion. There's often a close ~~identity~~ connection between who the speaker is and what the speaker says: between the identity of the speaker and the content of the message. (Sometimes there's a perfect correlation.) And if that's true, speaker-based restrictions often will raise the same concerns as content-based restrictions -- that these restrictions have arisen from a desire of the government to suppress certain ideas and that these restrictions will in fact distort public debate.

same concerns - skew + motive

Court says look to purpose: The Court in Turner is not oblivious to this problem. In response to the problem, the Court says it will look to the purpose of the law: if there's a content-based purpose, then the law will be subject to strict scrutiny, even if the terms of the law are only speaker-based. This is where the majority of the Court says that the government's justification did not have to do with the kind of programming local broadcast stations provide, that it instead had to do with the simple desire to preserve local broadcasting (that is, free programming) in the face of the bottleneck problem created by the structure of the cable industry. Because the purpose, according to the Court, is content-neutral, the restriction again need not face strict scrutiny.

Very difficult: But this way of dealing with the issue seems inadequate. The Court is really no good at investigating legislative motive directly -- nor could it be. Consider the case here. Maybe the purpose of the law was the one the majority picked. Or maybe not (the Court itself later admits that this purpose is not all that plausible because there's no reason to think local broadcasting is threatened). Maybe the law was just a product of the political power of the broadcasting industry. Or maybe the law grew out of the belief (as the dissent thought) that local broadcasting exposes people to particularly valuable, useful, educational programming. Or maybe, to be more cynical, the law grew out of the belief that local broadcasting exposes people to local programming, which benefits local politicians. The point here is that it's awfully difficult to say. And because it's so difficult to say, what the Court ends up doing is to say that there in fact was a permissible purpose when there's really ~~only~~ a conceivable permissible purpose.

i.e. That there's

Better course: The result of all this is that speaker-based restrictions will be subject to relatively deferential review unless they're a fairly transparent subterfuge to promote or suppress particular ideas. And this is so even as I said, the identity of speakers is often inextricably bound up with the content of speech. The better course would have been for the Court to say: "There are certain kinds of facial classifications that raise a danger of impermissible motive. Content-based classifications ~~obviously~~ do. Speaker-based classifications do too, although possibly to a lesser extent. We're never going to be able to determine this question of motive directly. Instead what we're going to do is to say that laws that on their face raise this danger are subject to some kind of heightened scrutiny, over and above what's given to pure content-neutral laws."

Better course continued -- options: That might mean treating all speaker based laws

as if content-based. It might mean establishing some kind of middle tier for speaker-based laws, as the Court seems gradually to be developing for subject-matter restrictions. It might mean treating speaker-based laws as content-based if but only if such restrictions correlate closely with specific, identifiable content. Any of these approaches would have been better than the one the Court picked, which is to ignore the generally suspect nature of speaker-based distinctions and subject each such distinction to review for impermissible motivation. instead

What's a content-based purpose; diversity? Now so far I've been assuming that we all know what we mean when we say that some purposes are content-based (hence illegitimate) and some purposes are content-neutral (hence legitimate). But it's pretty clear that the Court hasn't come close to figuring this out -- hence, the second question that I said I would talk about. In particular, it's clear that the majority is quite ambivalent -- and maybe quite confused -- as to whether it is a legitimate or an illegitimate purpose for the government to regulate in order to increase people's access to a variety of information sources and a diversity of views. Here, I fear I will overlap with what some other people are slated to talk about, so let me just say a very few words.

What Court says and tension: The Court says it's legitimate for the government to wish to retain local broadcasting and the free programming it provides. The Court goes further: it's legitimate and I quote to "promote the widespread dissemination of information from a wide variety of sources." But the Court seems to agree with the dissent that if Congress had considered the actual content of this programming -- whether it was useful or whether it was underrepresented in the speech market --that would have been impermissible. But what exactly does this mean? How do you promote diversity of view, variety of information without thinking about content? Doesn't the one include the other, at least sometimes? -- or at least doesn't any sensible conception of the one include the other, at least sometimes?

Tension again; must resolve: The key tension here is between (1) the ~~rights of~~ interest in access -- and the interest in diversity -- that the Court at least tentatively is recognizing in Turner and (2) the Court's longstanding distrust of any regulation that takes note of, accounts for, or emerges from the content of the speaker's message. ~~We will not know what Turner really means until the Court more explicitly takes up and attempts to resolve this tension, in the case involving broadcasters.~~

What Turner seems to say, most of all, is that the Ct has yet to reconcile or choose between these two: between its distrust of govt + its understanding that govt may in some instances promote a well-functioning sphere of expression.

Work-in-progress

Pacing room

Simple or simplistic? Let me first state the thesis of this paper in a single sentence. The fact that I can state it in a single sentence may mean its beautifully simple or may mean its ridiculously simplistic -- I teeter back and forth between the two.

One-sentence version: The one-sentence version goes like this: An extraordinary amount of First Amendment doctrine -- and the most important parts of that doctrine -- can be understood -- more than that, can best be understood -- as an attempt to prevent government from taking action based on impermissible motives. Or, I can say that in another way, still one sentence: The point of First Amendment doctrine (or at least its primary point) is to separate out permissibly motivated government action from impermissibly motivated government action and to ensure the invalidation of the [redacted] impermissibly motivated action.

Why important -- what courts say: Let me start by saying why I think this is an important thing to say. If you look at what courts say about the role of motive analysis in First Amendment doctrine, it's really quite all over the lot. There are some places and some contexts in which the court seems to be concerned about why government acted -- and where the court even says that that's what it's concerned about. On the other hand, you have this grand statement in *O'Brien* that at least when it comes to legislative action, the court can't look at motivation -- and that statement is understood to be the reigning law on this subject. So it seems as if there's some real uncertainty in the cases as to whether the courts should care about impermisible motive, what the courts can do to explore motive, and so forth.

Scholarly writing: Now when it comes to scholarly writing, I think it's fair to say that there has not been a lot of attention focused on the role of motive. That's not entirely true. Various pholosophical theories of free expression might, with some stretching, be labeled motivation theories -- Schauer, Scanlon, David Strauss. And then Geof and more recently Cass have discussed how some notion of impermissible motive plays into one part of First Amendment doctrine -- the distinction between content-based and content-neutral laws. But in general, scholars have tended to focus more on the effects of speech regulation than on its sources. Another way to say this is that scholars have tended to focus more on the value of speech -- why we should care that its being interfered with, whatever the reason -- and less on the reasons underlying the interference.

Effects and motive: In order to figure out whether First Amendment doctrine is animated by a concern about effects or a concern about motive, we have to have a better idea of what might count as impermissible effects and what

might count as impermissible motive.

Distinction as to ~~motive~~ effects: With respect to effects, what the paper does is to draw what has become a fairly conventional distinction between effects on a speaker and effects on an audience. (Don't worry so much about labels.)

Speaker perspective: That is: we might care about a speech restriction simply because it prevents would-be communicators from speaking. People get a certain value out of speaking (often phrased in terms of autonomy); a restriction prevents them from getting this value. What we care most about in this version of the world is giving as many people as many different opportunities to speak as possible.

Audience perspective: Or: we might care about a speech restriction because it mars or distorts -- makes worse in some way -- some realm of public discourse. In order to make decisions or in order to arrive at truth, people (the audience now) needs exposure to a proper range and balance of ideas. A speech restriction violates the Constitution when and to the extent that it prevents people from getting the information they need. So: what we care most about here is not giving everyone an opportunity to speak but giving everyone exposure to an appropriate range and balance of ideas.

Both effects theories: Now under both those understandings of what the First Amendment is about, we care preeminently about the effects of a speech restriction -- about its effects on the sum total of opportunities to speak or its effects on this thing called the sphere of public discourse.

Purpose as stronger explanatory factor: What the paper says is that First Amendment doctrine is better explained by reference to purpose -- not by reference to either of these sorts of effects (although there are clearly connections between the two an I don't want to minimize them). The actual doctrine does not attempt to ensure that the greatest number of expressive opportunities remain open. Neither does it attempt to ensure that the best possible world of discourse be created. What it does is attempt to ensure nothing about effects, but something about motive: specifically, it attempts to ensure that in restricting speech, the government isn't acting for an impermissible reason.

Displeased with discussion of impermissibility: Now: what would it mean for the government to restrict speech for an impermissible reason? I'm not particularly satisfied with this part of the paper; it seems to me very labored. On the one hand, I'm saying I'm not really justifying why this reason for restricting speech is so bad; I'm just doing some combination of extrapolating from some indisputable principles and working backward from the doctrine. On the other hand, the discussion is semi-justificatory; and it all seems just too wound up and -- well, labored -- to me. But the basic point goes as follows.

Censorial and noncensorial justifications: There are two broad categories of justifications for restricting speech: we can call them if we want censorial and noncensorial. The censorial justifications, I say, relate simply and solely to trying to establish or ordain orthodoxy. The government (or the public) approves of a certain idea and disapproves of another; hence the government favors the one and restricts the other. That is impermissible. But of course there are a whole range of other reasons for restricting speech. We might want to restrict speech because it's emotionally assaultive. We might to restrict speech because it will provoke violence. We might want to restrict speech because it will lead to some other violation of the law. All those sorts of reasons should be understood as different from the censorial justifications -- and as perfectly permissible.

Interconnected: Now the paper tries to make clear that I understand that these two sorts of justifications cannot be separated very easily; indeed, in large part the paper depends on that understanding of interconnection (because its that interconnection that makes any direct inquiry into motive futile). It is very rare that someone wants to restrict speech just because they don't like an idea. Usually they'll say: well, I want to restrict this speech, and I suppose you could say it's because I don't like this idea; but there's a reason I don't like this idea, and the reason is because it does some bad thing -- causes emotional harm, leads to violence etc. And most of the time people will not only say that; they'll really mean that.

But still separate: But all that said, I also want to say that censorial justifications are not entirely reducible to noncensorial justifications. In fact, the presence of censorial justifications -- the presence of distaste or dislike of ideas -- will make us assess harm differently and will make us evaluate differently the question when harm rises to the level where it justifies a restriction. Example: two demonstrations, one with speech you like, one with speech you don't; how close to riot before you call out the police? See civil rights demonstration cases.

Key principle: If that's all so, the key principle of 1A law is this: government cannot restrict speech if that speech is tainted by these censorial motives -- this wish to establish orthodoxy, this dislike or distaste for an idea.

Impossible to discover: But here's the rub: how in the world do we figure that out? I don't need here to go through the standard list of difficulties respecting the discovery of legislative motive. All those apply here. But now add to that the fact that in this context (for the most part) even the legislators -- even the people who have the motives -- can't really separate them one from the other (for the reasons discussed above). So how can a judge do so? And especially how can a judge do so if the judge herself has a set of attitudes about the ideas in question -- which, again, she herself cannot pick apart? Discovery of purpose in this context seems a hopeless enterprise. And indeed, we never see courts trying to do this sort of thing.

Indirectly through rules: But -- and here (finally) is the point of this paper -- we might be able to get to motive indirectly, through a set of laws that on their face have nothing to do with motive, but that are directed entirely towards the terms and effects of legislation. Those rules would enable us essentially to ask about motive without asking about motive. That's what I argue most of our First Amendment doctrine does.

Under- and over-inclusive; like presumptions: Before I give an example of how this works, let me just say that like most rules, these are going to be under and (especially) overinclusive. The rules will make errors. But they make fewer errors than a direct inquiry into motive -- and so we use them. In much the same way that in other areas of law, we have adopted various types of procedural mechanisms -- presumptions and shifting burdens of proof and such -- to deal with the difficulty of a person proving and a court finding impermissible motivation.

Example: CB/CN: Now an example -- and let me remind you again that the heart of this paper is really meant to lie in the examples. The most familiar example: the distinction between content-based and content-neutral regulation, of which RAV is one particular (though odd) instance.

CB/CN distinction: Explain the distinction: content-based vs. content-neutral. And then viewpoint-based as worst of all content-based.

Speaker interests can't explain: Why? Can't be explained by reference to speaker interests. Many CB laws will interfere with total speech opportunities less than CN laws. Use billboard examples. Then use RAV.

Also audience interests: Stone argument; but what of marginal (and greater CB effects of CN laws): Also can't easily be explained by reference to audience interests (although Stone says they can -- explain his argument). But -- some CB incredibly marginal -- see again RAV. By contrast, some CN have real CB effects. May not want to draw lines, but why not? Some don't seem so hard (again RAV). To extent we don't want to draw lines, it actually has to do with a fear of bias; and to extent we can say that, it's really motive that's driving the doctrine.

And Cass argument -- can't say it skews: More can be said. All above assumes that disparate treatment of ideas skews or distorts the speech market. But it may have the opposite effect -- see Fiss and Cass. Given all CN laws, speech market starts out skewed, this may unskew; see again RAV. Of course, may not want to give govt this power -- but again why not? for fear of improper motives animating govt action. Again, fear of motive drives the doctrine, not effects per se.

Purpose explains: Motive explains CB/CN distinction perfectly. When likely to fear impermissible considerations? When legislation affects only one idea. When least likely? When legislation affects a range of ideas. Subject distinctions fall somewhere in between the two.

CSI standard a way of showing good motive, of beating the presumption: Now of course we do allow CB regs -- when govt makes a great showing of justification. This is where govt rebuts the presumption. The presumption is of an impermissible reason. Govt comes back and says: emergency; proves we would be doing this even if we liked the speech.

Other examples to follow -- all major fault lines: That's one example. What the paper is supposed to do is to show that all the major fault lines of First Amendment doctrine can be explained in the same way (though haven't thought all of this through yet). At any rate, that's the basic point. Time for questions.

Presentation on Critical Race Theory/Derrick Bell

CRT and Bell: I was asked to talk today about a growing new movement in legal scholarship called Critical Race Studies. And I'm going to talk particularly about the person who can justly be labeled the founder and head of that movement -- Derrick Bell.

Remote from classroom? Now frankly, I'm not at all sure how discussion of the Critical Race Studies Movement or of Derrick Bell will help you in the classroom. I suspect that there won't be a very direct connection between what we'll do here for the next couple of hours and what you do in your classroom each day. I say that so you won't be disappointed if what I'm talking about here seems a bit remote.

Growing and hard to define: Critical race theory got its start in the late 1970s, perhaps the early 1980s. By now, many law professors all over the country -- most African-American, some Latino, some Asian -- would call themselves critical race theorists and say they're doing CRT work. Because of that, it's become increasingly hard to define or describe the movement. Each person works in some slightly different area and some slightly different way. Disagreements have developed among people who refer to themselves as critical race theorists. The movement has become more diffuse and amorphous.

Most general common questions and claims: Still some things can be said to define and describe the movement as a whole. Most generally, what critical race theorists ask about is how legal doctrine -- legal doctrine of all sorts, ranging from constitutional law to labor law, from criminal procedure to civil procedure -- reflects and perpetuates racial subordination in America. What most critical race theorists believe is that law, in a variety of ways, works to maintain the subordination of members of minority groups. And what most critical race theorists believe is that the achievment of racial justice in this country, if possible at all, will require not merely the more even-handed application of current laws -- that will do less than nothing -- but a root and branch transformation of the legal system.

Four features: More specifically, works of CRT often share four common features:

Pervasiveness of racism: First, CRT takes as a given -- as its first premise -- that racism infects every aspect of American law and Amercian life. That racism is deep and pervasive -- some would go so far as to say inevitable and permanent.

"Neutral" law as mechanism of racial subordination: Second, CRT attempts to show that the claims of the legal system to neutrality, to impartiality, and to objectivity are false claims. CRT attempts to show that the law -- even

when it seems neutral and even-handed -- in fact works in the interest of dominant groups in American society and particularly in the interest of dominant racial groups.. CRT attempts to show that the so-called "logic of the law," that so-called "neutral principles" are a sort of cover for a deeply ingrained system of racial domination.

Critical of civil rights strategies: Third, CRT generally is extremely critical of the activity -- the strategy and even the goals -- of the traditional civil rights movement. The thinking here is that the traditional civil rights movement believed that all that needed to be done was to make the laws neutral -- to end legal segregation in the schools, for example -- in order to achieve racial equality in America. But such reforms, critical race theorists say, were ineffectual, and necessarily so -- because they ignored the way even neutral laws could effect racial subordination. In addition, it might be said that critical race theorists see the civil rights movement as too "reformist," too "gradualist," not sufficiently committed to the broadscale social transormations necessary to achieve racial equality.

Insistence on incorporation of minority perspectives and use of stories: Fourth, and relatedly, critical race theory insists that the law -- legal doctrines of all sorts -- be reformulated, fundamentally altered, to reflect and incorporate the perspectives and experiences of so-called "outsider groups," who have known racism and racial subordination at first hand. Critical race theorists often write not in traditional, lawyerly terms, but with parables, and stories, and dialogues. The thinking is that these techniques can better demonstrate the actual experiences of members of minority groups -- experiences which should be accepted by and incorporated in the law. In addition, the decision to spurn traditional techniques of legal argument reflects the belief that these apparently neutral techniques are not neutral at all -- that they have been the means of promoting not some objective system of truth and justice, but instead a system based on racial power.

Derrick Bell as exemplar: Now Derrick Bell's writing illustrates each of these four aspects of critical race theory. He believes that racism is a pervasive -- and a permanent -- aspect of American society. **Read 1.** He believes that the legal system is a means of promoting a system of racial subordination -- even, or perhaps especially, when it makes claims to objectivity and neutrality. **Read 2.** He is deeply critical of the strategies and goals of the traditional civil rights movement -- of which he used to be a part. And he insists that law must take into account the experiences of minorities, which he attempts to explicate through dialogue and stories.

Biographical background: First, a little biographical background. NAACP Inc Fund -- doing school desegregation. Then one of first A-A profs at Harvard. Then, one of first A-A deans -- at Oregon. He left Oregon over a dispute about whether to hire an Asian-American woman, returned to Harvard.

Disputes over series of African-Amer women (Harv has none). (Participated in sit-in in Dean's office; Clark: "wish he'd figure out that Harvard is not a lunch counter.") Went on leave til Harvard hired. Still not happened; his leave time ran out; now at NYU.

Structure of two books: Two books; both follow same general structure. Geneva Crenshaw talking to a fictional, ever hopeful "Professor Bell."

Education "story": Story I gave you is less storylike than most; in fact, hardly a story at all. But I picked this one because it deals with education -- specifically with the effort to desegregate schools in this country and the result of that effort. In this story and the dialogue that follows, Bell seems to me to make the following two crucial points:

Desegregation benefitted blacks least: First, the struggle to desegregate the schools has benefitted least the black children it was supposed to help. Whites have used desegregation mandates to achieve educational reforms for themselves, while ignoring the needs and grievances of the black population. All too often, desegregation proved no help -- and sometimes a real harm -- to black schoolchildren.

Error of civil rights movement: And second, as the results of the desegregation imply, the civil rights movement committed a real error in devoting such time and expense to the mere goal of integration. The movement confused integration (racial balance) with what children need- effective education. **Read 111.** They chose this mistaken course precisely because they took a too-optimistic view of the extent and strength of racism in American society; they throught that once racial balance had been ordered, the system would become non-oppressive (instead of the system simly finding another way to opporess black children). The civil rights lawyers would have been better off insisting on greater funding and control of traditionally black schools, with mandated desegregation only a long-term goal.

Essential message: Essential meesage here is on page 118. **Read 118.**

Pose some questions: Now I was hoping we could get a discussion going on some of these points, and I thought I would try to set it up by posing the following sets of questions. I'm going to pose the questions in a general way, but it may be that the best way to address them is by reference to the particular problem of education. I am sure that as schoolteachers, you will have a lot to teach me on that score.

Racism permanent? First, is racism not only as currently pervasive, but also as inevitable and as permanent a part of American life as Bell and the critical race theorists believe? If it is, is recognition of this fact a counsel of despair, suggesting that further struggle is hopeless? Or is it instead the realistic

understanding that any movement needs in order properly to set its priorities and choose its strategies?

Law as means of racial subordination? Second, does law serve as a means of perpetuating a system of racial subordination? Are the claims of our legal system to neutrality and objectivity mere camouflage -- a sort of cover for the promotion of the majority's interests?

What legal strategies? Third, what legal strategies should members of minority groups today adopt -- what legal reforms (or transformations) should they press for? Did the old civil rights strategies work? Are they still working? If they should be replaced, what is the alternative?

Critically important questions: Those are the questions that Bell and other critical race theorists pose. There is no doubt that they are the among the most important questions -- if not the most important questions -- in all of American law.

Visiting Committee Lunch Speech

According to longstanding tradition, a new member of the faculty addresses the visiting committee at this lunch. So when Randolph Stone got the nod last year, I thought my single opportunity had come and gone. No such luck.

We actually do have two new members of the faculty this year -- sort of. The problem is that one, Ken Dam, isn't really new. He previously served on the faculty for many years. And the other, Mark Ramseyer, we don't really have yet. He decided to stay in Japan until next month. I've been wondering whether someone told him about this tradition.

Theat leaves me and Larry Lessig as the closest thing Chicago has to new faculty members. I think the reason I (and not Larry) was chosen for this high honor has something to do with the fact that, when Larry and I arrived last year, he was chosen to be faculty secretary -- another high honor that involves tabulating and recording the votes at faculty meetings.

When Larry was chosen to be secretary last year, I thought it was a pretty good thing. First, of course, because it left me with nothing to do. But also because I thought it showed some sensitivity on Geof's part to how it might look if he chose, from three incoming faculty members, the single woman to take dictation.

But since then, and especially since I was asked to give this speech, I've had second thoughts. Because one Chicago Law Scool tradition involves letting the Dean do everything. So we really don't have many faculty meetings. And another Chicago Law School tradition involves consensus and collegiality. So all are votes -- at least since I've been here -- have been unanimous. So I'm not sure what Larry does -- but I'm quite sure I've gotten the worse of this deal.

The tradition of having a new faculty member give this speech, when you think about it, is really rather odd. Take a person -- usually a completely new person -- a person who doesn't know anything about the University of Chicago Law School. Take that person and tell her to make some intelligent, but of course flattering, remarks about the Chicago Law School to the members of the visiting committee.

You can see why some law schools would do it that way. For example, I went to Harvard. This would be a perfect tradition for Harvard. Because it seems to be true -- ask anyone -- that the longer you stay at Harvard, the less you can remember about what attracted you there in the first place.

But Chicago -- I think Chicago's quite the opposite. Chicago grows on you -- week by week, month by month, and (I hope) year by year. Which means that

you might get a more starry-eyed speech from me today than you've heard in the past, from people who just arrived, or than I would have given last year.

Rather than just gush indiscriminately, though, I thought I'd try to give a little focus to my remarks -- and I thought the way to do that would be to read the MacCrate report, which Geof had told me was the subject of this year's visiting committee session. So a few weeks ago, I read the report, with the intention of saying something about what it said.

Now by this time, you've spent a lot of hours talking about what the MacCrate report said. So doubtless you're all going to be glad to hear that I changed my mind. I changed my mind because what most struck me about the MacCrate Report was not what it said, but what it didn't say -- the trend in legal education that it completely missed.

If you read the MacCrate report, this is the picture you get of legal education: Students are taught in their three years of law school the methods of legal analysis, as well as legal rules and principles. They are taught these things by faculty members who care about the discipline of law. Students are not taught how to negotiate deals or how to counsel their clients or how to manage their offices -- and, according to the MacCrate report, this is a problem. But the one thing they are taught -- the one thing we don't have to worry about -- is legal analysis and reasoning, and the substantive rules of law.

Well, I have to say that I want to know what law schools the MacCrate Committee looked at before writing its report. Because it seems to me that the Committee wholly misunderstood the current state of legal education and thus misdiagnosed the problem.

The real problem with law schools today is not that they don't teach factual investigation and negotiation and counseling. The real problem with law schools today is that, increasingly, they don't teach law -- that they don't value law as a discipline and that they see as old-fashioned or as intellectually bankrupt teaching that focuses on the method of legal analysis or the substance of legal rules.

Last year, for example, I had occasion to look at the transcript of a student from an unnamed but famed school -- in New Haven -- whom we were considering hiring. The student had taken eight what are called university courses: these are courses that don't have anything to do with law. She had taken four independent research courses. These are courses that don't have anything to do with anything. Altogether, she had taken four -- count 'em four -- courses after the first semester dealing with substantive law. She did though know a lot about such things as the Heuristics of Post-Structural Meta-Procedure.

But I'm not just talking about the non-law courses that law students at

many schools seem to spend much of their time taking. What's worse is that even in courses with names like Torts and Evidence and Federal Jurisdiction, many professors at many law schools have very little interest in examining legal principles or instilling a grasp of legal methods. These professors are bored by law, and they communicate that boredom to their students. They feel disdain for the legal profession, and they communicate that disdain to their students. They behave as if to teach law, let alone to practice law, is to do something pedestrian, beneath the notice of the true intellectual.

Except, of course, at Chicago -- and here, I'll throw in a personal story. At the same time, I applied to Chicago for a teaching position, I applied to a number of other schools. My first interview was with a school which will remain nameless but which is located in Ann Arbor; I went up there and talked to some people and thought I had done pretty well. But about two weeks later, I got a call from the chair of the appointments committee, who told me it wasn't going to work out after all.

Now I had some interviews coming up, and I was interested in finding out what I could do better. So I asked him what I had done that I shouldn't have, or what I hadn't done that I should have. And he said -- "well, it really wasn't anything like that -- it wasn't that you did something or that you didn't do something. It was really just who were you were." And I said, "Oh?" And he said, "yeah, we thought you were ... well, we thought you were very much a lawyer."

Then he went on -- he asked me -- "Have you been to Chicago yet?" I said I was going in a couple of weeks. And he said, "You know, I think you're going to do really well there; in fact, I think they're going to hire you -- because at Chicago, at Chicago, they don't mind that kind of thing."

Well, here I am, so I guess they don't. But I'm hardly the only proof. Last year, we had a visitor here from another law school -- a law and economics scholar. One day we got into a discussion about the differences between the two schools, and he said what struck him most about the Chicago was the kind of discussion that took place at the roundtable, the famed institution where Chicago faculty members eat lunch.

Now I have to admit that when he said that, I thought he was referring to the speed and volume of the conversation, to the incessant interruptions, to the impossibility of getting a word in edgewise. But it turned out he was talking about the substance of the conversations. What amazed him, he said, was that we talked about law -- cases before the Supreme Court and such things. "Well," I asked, "what do you talk about at your law school?" "Not law," he said; "that would be thought unacademic."

And finally, a last appointments story, this one with me on the other side.

In the fall of last year, we interviewed an entry-level candidate. After the interview, I ran into Richard Epstein and asked him what he had thought. "Terrible," he said, "just terrible." (Except he said it faster than that.) I asked him why. "Would you ever," he asked me, "would you ever hire that man to be your lawyer?" I told him that I wouldn't, but that I didn't know if that was the proper criterion. He said: "it's not the only one; but it's absolutely indispensable."

Now, in all candor, I'm not sure it's indispensable. Maybe, just maybe, if it were, there'd be one or two people even here whom we'd have to fire. And in telling these stories, I don't want to be understood as saying that law professors should focus in their teaching (or, of course) their scholarship) on the exact same questions as practicing lawyers. Nor do I want to be understood as saying that law professors, again in their teaching or their scholarship, should blind themselves to insights from other academic disciplines. This is, after all, the birthplace of law and economics. And it's a place where I and many others concern themselves with and try to teach matters of "high theory."

But I suppose I do want to say that law schools, at a minimum, should take law seriously and care about it desperately. That law professors should view themselves as part of a broader profession, all of whose members take part, although in different ways, in a common enterprise. That law professors should train students to take their place in that profession. That, to this end, law professors should educate students both in methods of legal reasoning and in substantive legal principles. That law schools should be, primarily, about the law and that they should feel no shame in this mission.

Law schools today, especially the best law schools, are drifting away from these principles. They are turning their backs on the legal profession, on the study of the law itself. That, it seems to me, is the gravest problem in legal education. It is what the MacCrate Report should have addressed. And it is why I am overjoyed that this school overlooked my lowly status as a lawyer and decided to hire me anyway -- because it is a problem that this law school, perhaps alone among schools of its caliber, simply does not have.

LEGAL ISSUE

I thought as the only lawyer and law teacher on this panel, I should spend my time talking about a case -- a case that asks about the legality -- not the propriety, not the desirability but the very legality -- of a schoolboard policy removing certain books from the schools.

CASE

The case is called Board of Education vs. Pico. The school board involved made a decision to take 9 books out of the library -remove them from library shelves. Among the books were: Slaughterhouse 5, by Kurt Vonnegut; Soul On Ice, by Eldridge Cleaver; and Go Ask Alice. The schoolboard explains its action by saying that these books were, and I quote, "Anti-American, Anti-Christian, anti-semitic, and just plain filthy" The case got to the S. Ct. which had to decide whether this action comported with the Constitution -- specifically, the First Amendment.

FUNDAMENTAL TENSION

Now in deciding that question, the S. Ct. had to confront what I believe to be the fundamental tension in this area. On the one hand, public schools, like all institutions of government must comply with the command of the First Amendment and the principles underlying that command: a commitment to freedom of inquiry and diversity of view and a promise to act in neutral manner toward the range of ideas -- good and bad, true and false, that exist in our society. On the other hand, ~~by~~ schools - by their very nature and purpose - must teach, must inculcate certain values and views -- those which society at large believes most appropriate (in the den of its young people). How are schools to reconcile these two sets of purposes and obligations?

BRENNAN OPINION

In the case, Justice Brennan wrote an opinion disapproving the Board's action. He pointed out that these books were not textbooks but library books. Although the Bd had great freedom in picking textbooks, it did not have the same freedom to pick and choose ~~textbo~~ library books. He then said that with respect to library books, the critical question related to the purpose of the schoolboard. If the Board removed the books because they were "educationally unsuitable" or even because they were "pervasively vulgar," then the decision complied with the 1A. But if

the ideas in them, then the action violated the 1A. (Query ~~what~~ whether the ~~the~~ a difference between the two.)

DISSENT

The dissent took Brennan on ~~a~~ on all counts. First, it said that if the govt could choose which textbooks to use, then it surely could choose which library books: after all, it was textbook that posed the greater danger of "imposing a pall of orthodoxy over the educational process." More important, the dissent said, imposing orthodoxy was perfectly permissible in the schools. ~~The~~ Schools impose orthodoxy all the time; indeed, schools are supposed to ~~do exactly~~ ~~this~~ impose orthodoxy.

The dissenting Justice wrote that he would allow schoolboards to remove books "because they are indecent, because they extol violence, intolerance, and racism, because they promote ideas and values repugnant to a democratic society.

And the dissent continued:

> It is permissible and appropriate for local boards to make educational decisions based on their personal, social, political, and moral views. Libraries serve as part of schools' inculcative role. They are not designed for free-wheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas

exhibits phobias in a society – what a society censors, what most fears + anxious abt

CONCLUDING QUESTION

I'd like to conclude by asking you to consider which view you agree with and by suggesting that all of the school teachers in this room are in as good a position as the US Sup Ct Justices to decide this legal question. Because as should be obvious, the question does not depend on legal niceties. It rides on different views of public educational institutions and their roles -- specifically, in what measure public schools are institutions of value neutrality and in what measure they are institutions of value inculcation. That's the question of this case -- as it is the question underlying most school censorship issues and controversies.

Uphold but unmoved

Were I a judge, I believe I would have upheld Professor Gray's "hate speech" — or should I say, "harassment" — regulation. But I must admit to feeling profoundly unmoved by the story of its invalidation. ☹

Why unmoved

Unmoved, if this is syntactically possible, on two different levels. First, on the doctrinal level, because whatever mistakes the court made, in the scheme of things — as I think Prof. Grey would agree — relatively minor. Second, on the practical level, because the existence or non-existence of this regulation cannot be thought to have any real consequence, except to the extent that discussion of it diverts attention from matters of greater import and strategic benefit.

Two reas

First, some doctrine. As I understand it, Prof Grey thinks the court's doctrinal analysis was flawed, for two reasons. He also provides a third, far more radical critique of what the court did. I'll save discussion of that — for a bit later and focus on the more contained criticisms, right now.

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Incid restraint!

First, Prof Gray says, the court failed to understand that this was an incidental restraint — because a generally applicable law. True, the law talked about speech in particular — but only in the context of

talking about much else. The code covered harassment; included w/in that category was harassing speech and harassing conduct. This was not a speech code, but a harassment law, that in the interests of clarity -- usually a virtue of regulations affecting speech -- ~~broke down into its components parts~~ separated out the variety of verbal and non-verbal acts falling within it.

Assumes correctness of key distinction

Now it's important to understand that this argument assumes that a great deal of 1A law - a fundamental distinction of 1A law - is right on target. That is, the argument assumes the correctness of a distinction between direct & incidental restraints between laws directed at speech and conduct and laws targeting speech alone.

SKIP

Which box?

The question that Prof Gray believes the Ct got wrong is a question of which box a close-to-the-line case properly falls in. We are presented w/ dusk - we must decide if it's closer to night or day. The Court says night (direct restraint); Prof Gray says day (incidental restraint). Who is right?

SKIP

Ct is right

My sense, though it is not a strong sense, is with the Court. It was

* responds to the likelihood of ideological hostility entering into governmental action.

when I read G's description of the policy; it was, even more, when I read the policy. The rationale for the doctrine of incidental restraints * goes something as follows: when a law focuses on nonexpressive conduct, restricting speech as an incidental and covert matter, the probability increases that a legislature, or other govt actor, will consider the regulation divorced from hostility toward a message. But once a law specifically calls attention to expression, even as among other things, this probability begins to slip. And if the law - as this policy did - focuses on speech, making clear that it is a product of balancing the value of certain ideas against its harms, then we are not too far from a direct restriction - i.e., a speech code.

That is G says, greater effect on exp (bec vagueness + chill) Extremely interesting point: 1) not true of all GALs 2) shows how 1A law is obsessed w/ motive

Minor important Accept: soundness relevance to sex har law

But G's and my other disagreement on this score seems to me of minor importance. Both of us accept that the line between incidental and direct restraints is a sound one. Both of us accept that that line is the critical doctrinal feature for purposes of determining the constitutionality of harassment laws. Both of us accept that this set of categories protects much if not most sexual harassment law. Both the lower ct and the SCt (Harris) agree with all this.

CONTRA - ? MARY - like making loud awful laugh for herself. ↓ some complexities, but

Confusion; drafting error

What is left is little more than a criticism of the doctrine

– indeed, a drafting problem. It is a dispute of some, but not large, doctrinal significance. It is, in short, as a matter of pure doctrine, nothing to get excited about.

RAV exceptic

Second, G objects to the lower ct's decision – as he objects to RAV itself – on the ground that the policies at issue fall within one of RAV's (many) exceptions: that for a subcategory of unprotected speech where the reason for the category itself apply w/ special force. Example – the most prurient + offensive obscenity.

Diversion: I love RAV.

Ct did miss ball.

Now I do think the Ct missed the ball here: This is why I might well have upheld the Stanford policy. G seems to me entirely right when he says that the reasons for regulating fighting words have especial force when those words are race – or sex-based. Scalia got the principle, but missed the application.

Why missed?

I ~~actually~~ think he missed it for a different reason than G. On G's reading, whenever the special reason for the regulation derives from the content of speech, the special reason can't justify a special regulation.

But this would rule out most of the examples Scalia uses (like gruesome obscenity). Scalia didn't see this case as falling w/in the exception because Scalia didn't see any special harm. This was a result 1) of his narrow conception of fighting words and *2) his insensitivity to race-based harm. A mistake, an unfortunate mistake, but one driven by the structure of the doctrine.

perhaps most jump doctrinal point Gruber.

Not a hund. challenge

~~And even if G is right on this limited point, still what I am saying holds: the~~ CCS criticisms of the Ct in this case, even of the Ct in RAV, do not represent a challenge to the essential doctrinal categories, to the lines drawn by the doctrine. They are criticisms only of decisions to place something in one category or another. Again, as a purely doctrinal matter, this seems of ~~little~~ some interest, but no major consequence.

(I do on time)

Alt-a hund challenge

At one point in his paper, G suggests the stakes are higher - that the Court was wrong for more than these minor reasons - that in fact the very foundations of 1st Amendment law are ripe for challenge. This is, of course, when G makes the point that conduct (here, discrimination) also may cause expressive harm - stigmatic injury. If we pro-

libit conduct on this basis – which we do – why not also speech? ~~Hence the walls of 1A law come tumbling down.~~

True abstract: Now everything G says here is true And we can indeed abstract his point and say that both conduct and speech often cause identical expressive and unexpressive harms. This is not only a phenomenon we see w/r/t discrimination; it exists on own.

What follows? lots But what follows from this? G's analysis would allow the prohibition not only of fighting words, but of all speech that causes stigmatic injury. Likewise, more generally, we could prohibit any speech wherever we regulated conduct in part for communicating a message. There would be no stopping point.

G admits – back to current law. And G knows and admits this. He says: Read 33. But what is that truce line? In the end, G brings us back to current doctrine. What he would change, or so it seems, is not fundamental doctrinal structure, but some perceived misapplications of that structure. This is good + interesting but, as I said, in the scheme of things a relatively narrow, focused minor criticism.

an insightful one but doesn't do anything w/ UNEGES INSIGHTS

Sensible, but no cause for consternation

Don't mean to say such criticisms are a waste of time — lots of times much more sensible. Only thing I wish to point out is that even if, as G says, the ct got it wrong (or rather got it partly wrong) — there is no great cause for consternation.

No practical conseqs (empirical assumps)

Of course, if these small doctrinal mistakes had large practical consequences, then that would provide good and sufficient reason to care about them. But I suspect this is not true. I am of course making some empirical assumptions here, as is so often true in 1A law. It is good to admit these are guesses up front. But ...

More to the "political"

Has a policy

Consider first that Stanford, even w/out this policy, has an anti-harassment policy — see FN 19 - Gerhard Casper. This, I may say, is a real generally applicable law. Stanford has it — and G himself admits that it can probably cover more speech than his own policy.

Trivial speech GATES — most least immoral answerable

Even putting this to one side,
~~Secondly~~ The kind of discrim sp. this policy covered is perhaps the least insidious, least harmful ~~most answerable~~ of all. G. hints at this at the very end of his article when he writes READ 58. Indeed, the very presence of this sort of speech — and our disdainful toleration of it — sometimes helps to enforce community norms. It is at any rate not the real evil, nor does it cause the real harm.

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Esp as compared to other sorts of discrim.

And much the same point seems even clearer when we compare this single act of discriminatory speech to all the

Refer to Gales

other kinds of discrimination in the world. & note that attacks on S's code were linked to attacks on affirmative actic; I suspect this is true — and no less true that defenses of that code were linked to defending affirmative actic. But consider; then, what was really happening: A serious + extremely consequential debate about race on campus was diverted onto another field, where the stakes were nowhere near so large.

Fighting on stupid battle-ground.

Of course, fighting ~~one~~ on one battleground may or may not prevent you from also fighting well on another. In this case, I think it clearly does. Because what is striking about this diversion is not only that it is a diversion — but that it takes place in the one place where the opposition seems to occupy the high ground. Such policies turn race issues into speech issues, ~~from~~ more, convert the ugliness of racism into the nobility of constitutional principle and right. This seems a strange spot for progressives to mount an attack on race privilege.

Why? Don't I know how to solve/talk about

I suspect that ~~it~~ embarrass both sides choose to fight public battles here — seemingly irrespective of tactical advantage — because neither knows how to contest

the larger issue of race and gender inequalities in our society. That issue is too big. We don't know how to solve it. We don't even know how to — or perhaps we are afraid to — talk about it. And so, as these mechanisms and things like ~~the~~ the Stanford policy — where the ground seems safer, ~~each of us in our own~~ the issues more contained, the ability to do something ~~ways, in different sizes,~~ can achieve a good ~~contribution~~ more clear.

Don't mean to say... But don't lose perspective

In saying all this, I do not mean to say that there is no such thing as discriminatory harassment — or that it causes no harm. I do not mean to argue that it should be ignored — or that the IA commands we ignore it — where it occurs. I mean only to point out the possibility of losing perspective in this area — and to hope that Stanford and other univs — lost it in adopting and defending such ~~this~~ policies. As I said, I think I would have upheld the policy — but I would have done so in the firm conviction that little of consequence would flow from it.

This one it seems to me consistent with, rather than fundamentally challenging of, current doctrinal rules + categories.

Ultimate lesson.

But I think the ultimate lesson of the Stanford policy may be (that we should) resist the temptation to fight on this ground: to retain perspective about what's more and less important.

As I noted I would have upheld the policy; it does seem to me essentially consistent w/ current + appropriate ~~than fundamentally subversive of~~ 1A law. But I wouldn't have drafted the policy in the 1st place. Tom, I have to tell you, as it does to Prof 6,